

N.K. Parker Transport, Inc. and M.K. Parker Transport, Inc. successor and joint Employers and Local 283 International Brotherhood of Teamsters, AFL-CIO and Steven D. Horsch. Cases 7–CA–38717, 7–CA–39313, and 7–CA–39660

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On November 28, 1997, Administrative Law Judge John H. West issued the attached decision. Respondent N.K. Parker Transport, Inc. (NK) filed exceptions and a supporting brief. Respondent M.K. Parker Transport, Inc. (MK) filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and set forth in full below, and to adopt the recommended remedy and Order as modified and set forth in full below.

The judge found that MK is a successor to NK; that at all material times MK and NK have been joint employers of the bargaining unit employees; and that the Respondents violated Section 8(a)(3) and (1) of the Act by entering into an employee leasing agreement in order for MK to avoid hiring a majority of NK's employees and to evade recognition of the Union. The judge further found that MK violated Section 8(a)(3) and (5) by dealing directly with employees, by setting terms and conditions of employment for newly hired employees which differed from those established by the collective-bargaining agreement between NK and the Union, and by refusing to return Steven Horsch to work. Although we agree with the judge that MK violated the Act, we do not adopt his findings of violations of Section 8(a)(3) or his entire rationale for finding violations of Section 8(a)(5).

I. THE RELATIONSHIP BETWEEN NK AND MK

A. Facts

Until March 1, 1996,¹ NK engaged in the tank truck transportation of oil and petroleum products at a facility in Dearborn, Michigan. NK's employees (drivers) were, at all material times, covered by a collective-bargaining contract between NK and Teamsters Local 283 International Brotherhood of Teamsters, AFL-CIO (the Union).

¹ All subsequent dates are in 1996 unless indicated otherwise.

Norman Parker, NK's sole owner, had been in poor health for a number of years and, in 1995, decided to retire. Parker entered into negotiations with Philip McKinley, already in the trucking business, for the sale of NK.

McKinley made it clear to Parker in their presale discussions that he wanted to acquire only NK's assets because he felt there were "potential liabilities hanging out there" that he did not want to incur.² Parker, on the other hand, told McKinley that he wanted the purchaser of his business to continue his drivers' employment so that drivers nearing retirement age could vest in the next level of their pensions³ and so that he (Parker) could avoid a substantial monetary penalty he would owe the union pension fund if NK were to go completely out of business.⁴

McKinley suggested an employee leasing agreement, to which Parker agreed. Parker and McKinley signed two separate agreements: an asset purchase agreement in which McKinley's new company, MK, agreed to buy substantially all NK's assets,⁵ and an employee leasing agreement in which MK agreed to lease drivers from NK.

Union Business Agent Mickey Hamilton testified about a meeting Parker and McKinley held with NK drivers just prior to the sale of NK. Parker told the assembled drivers that he wished to retire, but did not want to "pull the plug" on drivers who were working towards their pensions; that, as of March 1, he would cease transporting products and become an employee leasing company, leasing employees "predominantly" to MK;⁶ and that this business arrangement would allow drivers to vest in their pensions and allow Parker to avoid substantial monetary penalties imposed by the union pension fund. McKinley told the drivers that he would be getting a trained, qualified work force. He added that "nothing really would change" regarding day-to-day operations because Phil Mathes, NK's

² McKinley referred to NK's involvement in a serious accident in which two people had died.

³ The number of drivers NK was to lease to MK (not more than 15) was dictated by NK's requirement that it continue to be a fully participating employer in the Central States Pension Fund.

⁴ The record indicates that Parker was referring to the advice he received from counsel concerning his potential withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA). Under the terms of 29 U.S.C. § 1381, which was added to ERISA as part of the Multi-Employer Pension Plan Act Amendments of 1980, an employer that withdraws from a multiemployer pension plan is liable for its pro rata share of unfunded vested benefits. 2 Hardin, *Developing Labor Law* 1754 (3d ed. 1992).

⁵ The assets included office furniture, transportation contracts, and NK's customer lists. A second asset purchase agreement, between an equipment-leasing company owned by Parker and Transmac, a corporation set up by McKinley, provided that Transmac would purchase the tractor trailer trucks used by NK.

⁶ In fact, NK's *only* customer was MK.

vice president and operations manager, would continue to be in charge of dispatching the work.⁷

On March 1, without hiatus, MK commenced the business of tank truck transportation of oil and petroleum products,⁸ operating out of the same terminal previously used by NK, servicing substantially the same customers, and using the same driver complement. Mathes continued to be responsible for the day-to-day operation of the terminal, supervising and assigning work to the drivers now leased to MK. The drivers' job duties and benefits did not change. The terms of the collective-bargaining agreement continued to be applied to the leased drivers.

At the beginning of June, McKinley told Hamilton that it was necessary to hire additional drivers to handle increased business. NK wanted to "dwindle" its work force and did not intend to hire additional employees to lease to MK. Hamilton expressed the view that this sounded like a "double-breasting" operation and that the company had a contract with the Union to supply drivers. McKinley replied that Hamilton's problem was with NK with whom the Union had a contract. McKinley also said that although an MK contract with the Union covering MK's newly-hired drivers "would not be out of the question," McKinley had no interest in the Union's pension or health care plans.

MK hired its first driver on June 20. MK-hired drivers received wages and benefits different from those paid to leased drivers. McKinley did not bargain with the Union over the new drivers' terms and conditions of employment.

McKinley wanted new drivers MK hired to be given preference in dispatch order and shift selection. Mathes told him that the NK collective-bargaining agreement provided guarantees for leased drivers. McKinley agreed to allow Mathes to "work it out between the MK and NK drivers." Mathes devised a dispatch schedule delineating the order in which the MK and NK drivers would be put to work and the shifts to which they would be assigned.

B. Analysis

1. Employee leasing agreement

The judge found that the employee leasing agreement was a "sham" entered into "in order for Respondent MK to

avoid hiring a majority of NK's unit employees and to allow MK to evade recognition" of the Union. The record, however, does not support the judge's "sham" finding.

Evidence of antiunion motivation is lacking. Parker testified that he wished to protect his drivers by continuing their employment with whoever purchased his business. Parker was also legitimately concerned with insulating himself from a large monetary penalty which he would have incurred had he gone completely out of business. Similarly, McKinley had legitimate business reasons for acquiring only the assets of NK, i.e., he did not want to be responsible for NK's potential liability arising from a serious accident. At the time, the Union did not object to the lease agreement; the union-represented drivers continued to work under the terms of NK's collective-bargaining contract with the Union in a business that otherwise might have become defunct, and continued to vest in their pensions. Furthermore, employee leasing arrangements are common in the transportation industry.⁹ In sum, the record clearly establishes that the employee leasing agreement was not a "sham," but a legitimate business arrangement.

Relying on his "sham" finding, the judge stated that the Respondents' conduct can only be described as inherently destructive of important employee rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34-35 (1967). Therefore, he concluded that MK and NK violated Section 8(a)(3) and (1) of the Act by entering into the employee leasing arrangement. We have reversed, however, the judge's "sham" finding. Consequently, we also reverse his conclusion that MK and NK violated Section 8(a)(3) and (1) by entering into the employee leasing agreement.

2. Joint employer issue

We find that NK and MK are joint employers of the drivers leased to MK. We also find that NK and MK are joint employers of the drivers MK hired.

"The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 325 (1984), citing *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), and *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).¹⁰ Whether MK is a joint employer of the NK-supplied employees is "essentially a factual issue," and depends on a showing that MK "meaningfully affects matters relating to the employ-

⁷ According to Steven Horsch, a driver who attended the meeting, McKinley said that he wanted to expand MK's business and that he wanted the NK drivers to stay on, and Parker and McKinley stated that Mathes and Ed Kolle, an NK dispatcher, would continue to perform their dispatching jobs. Mathes testified that Parker told the drivers they would continue to be employed by NK and would be leased back to MK so that drivers could draw their pensions and the "withdrawal liability" would "go away"; and that McKinley stated that it would not be out of the question for MK to hire more drivers.

⁸ At this point, when NK ceased doing business as a trucking company, it became an employee leasing company.

⁹ See, e.g., *Laerco Transportation*, 269 NLRB 324 (1984), and *Schnabel's Drivers for Lease*, 249 NLRB 1164 (1980).

¹⁰ See also *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994).

ment relationship.” *Laerco Transportation*, 269 NLRB at 325.

The lease agreement provides that NK is to supply drivers to MK and be responsible for their wages and benefits. The leased drivers’ terms and conditions of employment are governed by the collective-bargaining agreement between NK and the Union. Nevertheless, MK in fact exerts sufficient control over the leased drivers’ daily activities to be considered a joint employer.

The lease agreement states that the leased drivers are to be “familiar with and comply with the work rules and safety procedures adopted by” MK.¹¹ As the following examples illustrate, MK has actively policed the drivers’ compliance with its work rules and safety procedures. On March 22, A&C Carriers Vice President Rodger Nelson¹² issued a memo to drivers about MK’s policy on theft and dishonesty. The memo prescribed discharge for any employee caught draining product from his trailer, as well as for any other pilferage, theft, or dishonesty. On April 7, Bill Halfmann, safety director for all three companies owned by McKinley, advised NK that one of its drivers needed a Department of Transportation-required physical exam and that he should take a drug test which was required by MK, but not by DOT. On April 21, Halfmann issued a letter of investigation, which can result in discipline, to an NK driver. In May, MK discontinued NK’s benefit of providing and maintaining company uniforms. At the time of these personnel actions, all MK drivers were leased from NK.

In addition, MK could effectively fire leased drivers. According to the lease, MK reserved the right to reject any driver NK supplied. As the Horsch example discussed in section II below illustrates, MK has in fact utilized this provision of the leasing agreement. See, e.g., *W. W. Grainger, Inc.*, 286 NLRB 94, 96 (1987), enf. denied on other grounds 860 F.2d 244 (7th Cir. 1988) (retaining right to refuse to employ any driver referred by driver leasing company, and to require the removal of any driver, indicative of joint employer status).

¹¹ The Respondents rely on *H&W Motor Express*, 271 NLRB 466 (1984). In that case, the Board refused to find a joint employer relationship despite the lessor employer’s requirement that leased employees comply with safety regulations and the lessor’s ability to request removal of a leased employee. We find that case distinguishable. The record in *H&W* revealed only a theoretical control over day-to-day activities of leased employees. In the instant case, as we show below, it is clear that MK, to an extent not present in *H&W*, meaningfully affects leased drivers’ terms and conditions of employment. Further, regarding the removal issue, in *H&W* a removal request merely led to a driver’s reassignment to another employer, whereas, here, a leased driver rejected by MK is effectively terminated.

¹² McKinley is part owner of A&C Carriers and McKinley Trucking in addition to owning MK.

We believe that the above facts demonstrate that MK exercised sufficient control over the working conditions of the NK-leased drivers to be found a joint employer, with NK, of those drivers.

Beginning in June, MK hired new drivers to accommodate its expanding business. These drivers perform the same work as the leased drivers and use the same equipment. The MK-hired drivers complete the same paperwork as the leased drivers, use the same drivers’ room, share the same dispatch and bulletin boards, and punch the same timeclock, all located at the prior NK terminal. Significantly, Mathes, an NK supervisor, and Kolle, an NK employee, dispatch the MK-hired drivers, as well as the leased drivers.¹³ All drivers are dispatched from the same terminal to service the same customers. MK has no supervisors or managers at the terminal on a regular basis.

We find that the above facts demonstrate that NK exercised sufficient control over the working conditions of the MK-hired drivers to be found a joint employer, with MK, of the drivers hired after June.¹⁴

3. Successorship

The Board has held that “[a] mere change in ownership of the employing business enterprise does not itself absolve the new owner from the obligation to recognize and bargain with the labor organization that represented the employees of the former owner.” *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enf. 709 F.2d 623 (9th Cir. 1983). Where there is substantial continuity between the predecessor business and the new employer, and where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by the union, the new employer will be obligated to recognize and bargain with the union representing the predecessor’s bargaining unit employees.¹⁵

In making a “continuity” determination, the Board looks to whether (1) there has been substantial continuity of business operations; (2) the new employer uses the same plant with the same machinery, equipment and production methods; and (3) the same or substantially the same employees are used in the same jobs under the same working conditions and supervisors to produce the same product or

¹³ NK asserts that mere dispatching does not in any way affect the employment relationship of MK-hired drivers. The record, however, belies this assertion. McKinley’s and Mathes’ testimony regarding the integration of the leased and hired drivers’ schedules makes clear that Mathes, an NK supervisor, was given latitude in making dispatching assignments. It is likewise clear that Mathes was the only supervisor of hired, as well as leased, drivers.

¹⁴ See *Continental Winding Co.*, 305 NLRB 122, 123 fn. 4 (1991).

¹⁵ *NLRB v. Burns Security Services*, 406 U.S. 168 (1973), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

provide the same service.¹⁶ This approach is primarily factual in nature and is based on a consideration of the totality of the circumstances in any given situation.¹⁷

The totality of the circumstances here persuades us that MK is successor to NK.

- MK is, like NK was, engaged in the tank truck transportation of petroleum products.
- MK's initial workforce consisted entirely of individuals previously employed solely by NK.
- MK exercises sufficient control over the working conditions of the NK-supplied drivers to constitute an "employer" of those employees within the meaning of Section 2(2) of the Act.
- MK is based at the same Dearborn terminal where NK conducted its business.
- MK performs substantially the same services for substantially the same customers.
- MK drivers perform the same work with much of the same equipment.
- MK drivers, both leased and non-leased, report to the same supervisor.¹⁸
- A unit of all MK drivers, both leased and non-leased, employed at the Dearborn terminal is appropriate for purposes of collective bargaining.¹⁹

In sum, with respect to the tank truck transportation of petroleum products, there is substantial continuity of business operations between NK and MK.²⁰ Accordingly, we find that, effective March 1, MK, as successor to NK, was obligated to bargain with the Union.

As a successor employer, MK was not bound to the collective-bargaining agreement of the predecessor, NK. *Burns*, supra, 406 U.S. at 291. Upon commencing operations on March 1, however, MK elected to maintain the terms and conditions of employment established by the collective-bargaining agreement between NK and the Union. Having done so, MK was obligated, under *NLRB v.*

Katz, 369 U.S. 736 (1962), to continue those terms and conditions in effect until it bargained to impasse with the Union. On June 20, when MK began hiring new employees, it paid them wages and benefits different from those set forth in the collective-bargaining agreement. MK took this action without prior notice to the Union and without providing it an opportunity to bargain. Accordingly, we find that MK violated Section 8(a)(5) by unilaterally implementing different wages and benefits for drivers hired on and after June 20.²¹

II. STEVEN HORSCH

A. Facts

NK discharged driver and union steward Horsch on February 13, 1997. Horsch filed a grievance over his termination. On March 18, 1997, the Michigan Tank Carriers Joint State Committee²² ordered, after considering the grievance, that Horsch "be returned to work with the Employer [NK] at such time that the Employer [NK] has work available." Following the Joint State Committee decision, NK advised Horsch that he would "be put on a regular schedule as soon as [NK] acquires another customer." Horsch has not been returned to work, allegedly because NK does not have a customer for which Horsch can work. NK's only customer is MK. MK has advised NK that Horsch's driving record does not meet MK's standards.

B. Analysis

The judge found that MK's refusal to return Horsch to work violated Section 8(a)(3) and (5). Regarding the 8(a)(5) allegation, the General Counsel does not argue that MK has an obligation to abide by the Joint State Committee decision. Rather, the General Counsel argues that MK has an obligation to bargain with the Union about Horsch's return. For the following reasons, we agree that MK violated Section 8(a)(5) by failing to bargain over Horsch's return to work.²³

¹⁶ *Premium Foods, Inc.*, 260 NLRB at 714. See also *Fall River Dyeing*, 482 U.S. 27 at 43.

¹⁷ *Id.*

¹⁸ Mathes continued to supervise the day-to-day operations of the Dearborn terminal. The fact that he did not solicit customers or direct maintenance operations for MK is insignificant.

¹⁹ Our finding in sec. I,B,2, supra, that all the bargaining unit employees are jointly employed by NK and MK distinguishes this case from *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000), which presented the issue of whether employees who are jointly employed may be included in the same bargaining unit with employees who are employed solely by one of the joint employers.

²⁰ NK points to a number of factors it argues establish discontinuity, such as that MK has its own operating authority and liability insurance, trucks now feature MK decals, drivers are not required to wear uniforms, and drivers are now treated to barbecues. The factors NK cites have little or no impact on matters affecting the employees' performance of their jobs on a day-to-day basis.

²¹ We also find, essentially for the reasons stated by the judge, that in June MK violated Sec. 8(a)(5) by dealing directly with unit employees and promising them improved benefits and working conditions if they would "switch" from NK to MK.

We do not adopt the judge's finding that the above conduct also violated Sec. 8(a)(3) of the Act. As discussed earlier, the judge's 8(a)(3) findings are based on an "inherently destructive" theory that is not supported by the facts of this case.

²² The Union's collective-bargaining agreement provides for this grievance procedure.

²³ We do not agree with the judge that the failure to return Horsch to work violated Sec. 8(a)(3). The General Counsel argued that refusing to return Horsch to work was an integral facet of MK's plan to avoid having to deal with the Union. The primary evidence for MK's purported plan was the employee-leasing agreement. We have found that the employee-leasing agreement was a legitimate business arrangement. There is no other evidence to support a finding that the failure to return

Under Sections 8(a)(5) and 8(d), it is unlawful for an employer to refuse to bargain with respect to mandatory subjects of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209–210 (1964). Termination of employment constitutes such a mandatory subject. *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). Similarly, the reinstatement of Horsch is a mandatory subject.

We have found earlier in this decision that MK is a successor to NK's tank truck transportation business, and that it is a joint employer with NK of the drivers that NK leases to MK. Our joint employer finding is based in part on the fact that MK has the right, under its lease, to reject any driver that NK supplies. In refusing to reinstate Horsch, NK relied on the fact that MK has exercised this right and has refused to accept Horsch as a leased driver. Thus, MK has control over Horsch's reinstatement and can bargain with the Union over this term and condition of his employment. It follows that, as a successor employer, the duty to bargain about Horsch's return to work attaches to MK. *American Air Filter Co.*, 258 NLRB 49, 53 (1981).

A union may waive its right to bargain about a mandatory subject if it does not request bargaining. The Board has held, however, that there is no waiver if it is clear that a request would have been futile. *L. Suzio Concrete Co.*, 325 NLRB 392, 398 (1998), *enfd.* 173 F.3d 844 (2d Cir. 1999). The record shows that it would have been a futile gesture for the Union to request either NK or MK to bargain about Horsch's reinstatement.

Following the Joint Committee's decision, NK announced that Horsch would be returned to work only when NK obtained another customer—an obvious fiction, as NK planned to have no customers other than MK. And, MK had clearly indicated that it would not accept Horsch as a driver. Inasmuch as NK immediately made it clear that it would not comply with the Joint Committee decision and MK made it clear that it refused to accept Horsch, we find that it would have been futile for the Union to request bargaining about Horsch's reinstatement following the Joint Committee decision ordering reinstatement.

We find, therefore, that MK violated Section 8(a)(5) of the Act by refusing to bargain with the Union about Horsch's reinstatement.

CONCLUSIONS OF LAW

1. NK and MK are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 283 International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees employed at the Respondent's Dearborn, Michigan facility, excluding all office clerical employees, guards and supervisors within the meaning of the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been the exclusive representative of all unit employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. NK and MK are joint employers of the employees in the appropriate unit described above.

6. MK is the successor employer to NK and is obligated to bargain with the Union as the exclusive representative of bargaining unit employees.

7. By dealing directly with unit employees and promising them improved benefits and working conditions if they would "switch" from NK to MK, MK has violated Section 8(a)(5) and (1) of the Act.

8. By unilaterally implementing different wages and benefits for newly-hired employees, MK has violated Section 8(a)(5) and (1) of the Act.

9. By refusing to bargain with the Union about Steven Horsch's return to work since on or about March 18, 1997, MK has violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that MK violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and take certain affirmative action to effectuate the policies of the Act.

Specifically, we shall order MK, on request, to rescind the unlawful unilateral changes made on and after about June 20, 1996. Nothing in our Order shall authorize or require the withdrawal or elimination of any changes unlawfully granted to employees without a request from the Union. Wages and benefits that must be restored pursuant to this order shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any amounts MK owes as a result of the failure to make payments to fringe benefit funds shall be calculated as specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), *enfd.* mem. 661 F.2d 940 (9th Cir. 1981).²⁴

²⁴ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, MK will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that MK otherwise owes the fund.

Horsch to work was motivated by union animus. We therefore reverse and dismiss this 8(a)(3) allegation.

Finally, we shall order MK to bargain with the Union about returning Steven Horsch to work.

ORDER

The National Labor Relations Board orders that the Respondent, M.K. Parker Transport, Inc., joint employer and successor, Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit by dealing directly with unit employees:

All full-time and regular part-time employees employed at the Respondent's Dearborn, Michigan facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Unilaterally implementing different wages and benefits for newly-hired employees.

(c) Refusing to bargain with the Union about returning Steven Horsch to work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, rescind the unlawful unilateral changes made on and after June 20, 1996, in terms and conditions of employment of unit employees, and make whole unit employees and benefit funds for losses suffered as a result of these changes in the manner prescribed in the remedy section of this decision.

(c) Bargain with the Union about returning Steven Horsch to work.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Dearborn, Michigan, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on

forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit by dealing directly with unit employees:

All full-time and regular part-time employees employed at our Dearborn, Michigan facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement different wages and benefits for newly-hired employees.

WE WILL NOT refuse to bargain with the Union about returning Steven Horsch to his former job.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local 283 International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of unit employees, and put in writing and sign any agreement reached on

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

terms and conditions for our employees in the bargaining unit.

WE WILL, on request of the Union, rescind the unlawful unilateral changes made on and after June 20, 1996, in terms and conditions of employment of unit employees, and make whole unit employees and benefit funds for losses suffered as a result of these changes.

WE WILL bargain with the Union about returning Steven Horsch to work.

M.K. TRANSPORT, INC.

Ellen Rosenthal, Esq., for the General Counsel.

Michael C. Gibbons, Esq. (Beyer, Howlett, P.C.), of Bloomfield Hills, Michigan, for the Respondent.

Donald Vogel, Esq. (Michael, Best & Friedrich), of Chicago, Illinois, for the Respondent.

Doyle O'Connor, Esq. (Steinberg, O'Connor, Paton & Burns, P.L.L.C.), of Detroit, Michigan, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge in Case 7-CA-38717 was filed by Local 283, International Brotherhood of Teamsters, AFL-CIO (the Union) on July 5, 1996, and the charge in Case 7-CA-39313 was filed by the Union on December 20, 1996.¹ The charge in Case 7-CA-39660 was filed by Charging Party Steven Horsch on March 31, 1997. An amended consolidated complaint (complaint) was issued on March 15, 1997,² alleging that N.K. Parker Transport, Inc. (NK) and M.K. Parker Transport, Inc. (MK) violated Section 8(a)(1) and (3) and Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), collectively, by entering into an employee leasing agreement in order for MK to avoid hiring a majority of NK's unit employees and to allow MK to evade recognition of the Union and assumption of the terms of the involved collective-bargaining agreement, by MK continuing as the employing entity and the successor of NK³ and then, by MK dealing directly with unit employees and encouraging them to leave the payroll of NK and become directly employed by MK and promising them benefits and improved working conditions, by MK hiring new unit employees as drivers and, without the Union's consent, unilaterally implementing different wages, benefits and working conditions for new drivers than those set forth in the involved collective-

bargaining agreement⁴ and by MK refusing to return Horsch to work.⁵ Respondents deny violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondents,⁶ I make the following

FINDINGS OF FACT

I. JURISDICTION

NK is a corporation with an office and place of business in Dearborn, Michigan. Through February 29, 1996, it was engaged in the business of tank truck transportation of oil and petroleum. Since March 1, 1996, NK has been engaged in the leasing of licensed truckdrivers and other personnel to MK. And since March 1, 1996, MK, a corporation with an office and place of business in Dearborn, has been engaged in the business of tank truck transportation of oil and petroleum. The complaint alleges, the Respondents admit and I find that at all times material, Respondents have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

FACTS

At the outset of the hearing herein the parties entered into the following stipulation, Joint Exhibit 1:

1. Some, but not all, of the office furniture and equipment, including two out of three computers, at Respondent NK's facility, were among the assets sold pursuant to the asset purchase agreement of March 1, 1996, among Norman Parker, N.K. Parker Transport, Inc. and M.K. Parker Transport, Inc.

2. Of the 13 tractors used by Respondent NK prior to March 1, 1996, which tractors were leased by Respondent NK from N.K. Parker Leasing, Inc., then owner of the tractors, 6 have continued to be used by Respondent MK since March 1, 1996, the tractors being leased by Respondent MK from Transmac, Inc., owner of the tractors. Of the 22 trailers used by Respondent NK prior to March 1, 1996, which trailer were leased by Respondent NK from N.K. Parker Leasing, Inc., then owner of said trailers, 13 have continued to be used by Respondent MK since March 1, 1996, said

⁴ It is alleged that Respondents' conduct is inherently destructive of the rights guaranteed employers in Section 7 of the Act.

⁵ The complaint points out that the Michigan Tank Carriers Joint State Committee, pursuant to its authority granted in the involved collective-bargaining agreement, issued a decision awarding Horsch reinstatement to his position with NK. As indicated in GC Exh. 14, it was resolved, as here pertinent, that Horsch would be returned to work with the Employer at such time that the Employer has work available.

⁶ MK has filed a motion to reopen the record. The General Counsel opposes the motion, accurately pointing out that the matter MK seeks to raise is a compliance matter. Accordingly, MK's motion is denied. The General Counsel's unopposed motion to correct the transcript in three places is granted. The company name on L. 3, pp. 100 and 103 is changed to NK. And the date on L. 24, p. 124 is changed to June 24, 1996.

¹ Both of these charges were amended on February 27, 1997.

² The index and formal description of formal documents, GC Exh. 1(aa), lists under "(v)" therein, an amended consolidated complaint, MK Parker Transport, Inc. indicates that the amended consolidated complaint is dated March 15, 1997, but it was served on May 19, 1997.

³ The complaint alleges that the Respondents have codetermined labor relations matters affecting unit employees, they have exercised common control and supervision over unit employees and they have been joint employers of the unit employees.

trailers being leased by Respondent MK from Transmac, Inc., owner of said trailers.

3. At all material times, Norman Parker has been the sole owner of Respondent NK and N.K. Parker Leasing, Inc.

4. At all material times, Phillip McKinley has been the 50-percent owner of Respondent MK and the 50-percent owner of Transmac, Inc., the remaining owners of each company being immediate adult family members.

5. As of March 1, 1996, Respondent MK had the same customers as did Respondent NK prior to that date.

6. On March 1, 1996, Respondent MK leased from Respondent NK all the employee drivers who had been employed by Respondent NK just prior to that date. No other drivers were subsequently leased from Respondent NK by Respondent MK.

7. Since March 1, 1996, Respondent MK has leased from Respondent NK Phillip Mathes and Edward Kolle.

8. Respondent MK has not leased from Respondent NK any individuals other than those described in item[s] 6 and 7 above.

9. Since March 1, 1996, Norman Parker and Phillip Mathes have been supervisors of Respondent NK, within the meaning of Section 2(11) of the Act, of the drivers leased to Respondent MK by Respondent NK.

10. Admit complaint paragraph 6b with respect to Phillip McKinley.

11. At all material times, William Halfman has been employed by A & C Carriers as the safety director and has also served in that capacity for McKinley Trucking, which pays a management fee to A & C for those services. Since March 1, 1996, Halfman has also served in the capacity of safety director for Respondent MK, which pays a management fee to A & C for those services. In his capacity as safety director, Halfman is responsible for insuring compliance with all United States and Michigan Department of Transportation (DOT) regulations.

12. At all material times, Rodger Nelson has been the vice president of A & C Carriers.

13. At all material times, A & C Carriers has been engaged in the business of tank truck transportation of oil and petroleum. Phillip McKinley has been a part owner of A & C and the other owners are immediate adult family members.

14. At all material times, McKinley Trucking has been engaged in the business of trucking. Phillip McKinley has been a part owner of McKinley Trucking and the other owners are immediate adult family members.

15. At all material times, Respondent MK has employed no managers or supervisors other than Phillip McKinley.

16. Respondent NK, prior to March 1, 1996, and Respondent MK, since March 1, 1996, leased the Dearborn facility from the same parties.

17. Since March 1, 1996, the drivers leased by Respondent MK from Respondent NK and the drivers employed by Respondent MK have used the same forms for driver's logs, vehicle reports, and freight bills.

18. Respondent MK first hired a driver on June 20, 1996.

19. Since March 1, 1996, Respondent NK's sole customer has been Respondent MK.

The asset purchase agreement dated March 1, 1996, by and between Norman Parker, an individual shareholder, NK (seller), and MK (purchaser) was received herein as General Counsel's Exhibit 3. The employee leasing agreement, dated February 28, 1996, by and between NK and MK was received as General Counsel's Exhibit 4(a) and (b).⁷ The asset purchase agreement dated March 1, 1996, by and between Norman Parker, N. K. Parker Leasing, Inc. (seller) and Transmac, Inc. (purchaser) was received herein as General Counsel's Exhibit 6. Phillip McKinley testified that he owns 50 percent of MK and his daughter owns 50 percent⁸; that he never had a joint venture or partnership with Norm Parker; that he rejected Parker's proposal of sale in late 1990 because he had just acquired A&C Carriers; that in 1993 when Parker approached him again to buy NK he rejected the offer because he thought the price was too high; that when Parker contacted him in September 1995 he told Parker that he would be interested but that he did not want to acquire anything other than the assets of Parker's company⁹ and he did not want N.K. Parker's labor force; that he agreed with Parker that if Parker was willing to operate a driver leasing company, MK would lease drivers from it; that he agreed to lease the number of drivers that NK had on its board but it would not exceed that number; that one of the reasons he was willing to take this approach was that with NK drivers there was a certain amount of trained and qualified drivers that were immediately available to start up this business with so MK could be up and running without going through an extensive training period of new people; that if he had not done this Parker would have had ERISA liability regarding the Teamsters' Central States Pension Fund; that MK was granted its own interstate and intrastate authority to provide the involved service; and that he negotiated a lease for the terminal property that NK formerly utilized but he leased less space than NK had leased. On cross-examination McKinley testified that he leased all the drivers NK had at the time and not just the long-term drivers who were close to their pension; that it was not a consideration in his decision making process that if he hired NK's work force, MK might have an obligation to recognize and bargain with the Union; and that he guessed he "probably fairly well would have understood that but it was not part of

⁷ GC Exh. 5 is a list of 13 drivers leased by MK from NK on March 1, 1996. The unit is described in par. 7 of the complaint as follows:

All full-time and regular part-time employees employed at the Respondents' Dearborn, Michigan, facility, but excluding all office clerical employees, guards, and supervisors within the meaning of the Act.

⁸ He and another daughter own the stock of Transmac.

⁹ McKinley testified that he did not want anything but the assets because he "felt there were potential liabilities hanging out there that . . . [he] didn't want to incur" On cross-examination McKinley testified that N.K. Parker had been involved in an accident in the late 80s that resulted in the death of two people and he "wasn't sure what the standing was there." McKinley also testified that the understood that Parker had the bulk of his business, including the interstate and intrastate authority and his drivers, in the transport company and the transportation equipment was in the leasing company.

... [his] decision making process.” On redirect McKinley testified that at the time MK bought the assets of NK, other than NK’s drivers, there was not a readily available driving force of petroleum drivers that would have been available to MK. Subsequently McKinley testified that it was very beneficial for MK to obtain a trained work force which was willing to transport gasoline, diesel fuel and aviation gasoline and which knew the requirements of the customers which NK formerly serviced; that if MK did not use NK’s drivers MK would have had to hire and train drivers which would have been a lengthy process involving 30 to 60 days; and that he believed that although there was a shortage of drivers he would have been able to fill the needs of MK if MK had not leased the drivers of NK.

The Union has represented NK’s truckdrivers for a number of years. The most recent collective-bargaining agreement between NK and the Union, General Counsel’s Exhibit 8, covers the period from March 27, 1994, through November 14, 1998.¹⁰

According to his testimony, Union Steward Steve Horsch and a few of the other drivers of NK were told by Phil Mathes that as of the first of March 1996 McKinley would be obtaining the equipment, the assets, everything of NK and the drivers were going to continue on as drivers.

Toward the end of February 1996, according to the testimony of Union Business Agent Mickey Hamilton, Horsch advised him of the pending sale of NK. Hamilton telephoned Phillip McKinley who indicated that he was considering purchasing the assets and leasing the involved drivers. McKinley invited Hamilton to attend the meeting which was going to be held with the NK drivers at NK’s facility the next day or so.

Either the last day of February or the first day of March 1996 Hamilton attended the meeting of NK drivers. He testified that the meeting was held at the NK facility; that he, Norm Parker, Phillip Mathes, who is the operations manager of NK, and McKinley attended the meeting; that Parker opened the meeting indicating that he wanted to get out of the business but he did not want to pull the plug on the drivers who were working toward their pension with the Central States pension; that McKinley told those assembled that he was interested in the business and he thought that the drivers were the most valuable asset in that he would be getting a qualified, trained work force that knew the work and the equipment; that when the drivers asked what would happen with respect to the day-to-day operations, McKinley answered that nothing really would change and it was going to continue the way it had been operating with Mathes in charge of the day-to-day workloads, dispatching the work; that McKinley said that as people reached their 5-year increments in their pensions they would, they could transfer from NK to MK where they probably would have a 401(k);¹¹ and that an employer which goes out of business has a withdrawal liability in that it has to pay its pro rata portion of the unfunded union pension liability. Horsch testified that this meeting was held on the last day of February 1996; that McKinley indicated that he intended to ex-

pand the business and he wanted the drivers to stay; and that Parker and McKinley both indicated that Phil Mathes and Ed Kolle were going to continue just as they were and that the sale was going to take place at midnight. Phillip Mathes, who is the vice president and operations manager for NK, testified that this meeting took place on Wednesday, February 21; that Parker told the employees that they would continue to be employed by NK and would be leased back to McKinley’s company so that the work force could be “dwindled” in that drivers who left would not be replaced, the drivers could draw their pensions, and the ERISA obligation would go away; and that McKinley indicated at this meeting that currently NK could provide enough drivers but MK hiring drivers was not out of the question. McKinley testified that Parker asked him to come to the meeting; and that he told those assembled that MK anticipated expanding NK’s customer list and he hoped that there would be more work than what they had enjoyed in the past.

Mathes sponsored a copy of NK’s seniority list, Respondent’s Exhibit 3, which lists 13 drivers, Dispatcher Kolle and Operations Manager/Dispatcher Mathes.

Hamilton testified that MK operated out of the same terminal that NK had; that all of the bargaining unit drivers continued to work out the same terminal; that the terms of the collective-bargaining agreement continued to be applied to the drivers; and that the Union continued to receive dues-checkoff and pension contributions on behalf of these drivers. Horsch testified that after March 1, 1996, there was no change in his job, the way the work was performed, or in his wages or benefits; that after March 1, 1996, some of the NK tractors were replaced with McKinley tractors, MK’s name was placed on the tractors and some of the trailers, and the managers at the Dearborn terminal remained the same except that NK’s vice president, Richard Frembes, was no longer there; that the three owner operators who worked for NK left sometime after March 1, 1996; that the name N.K. Parker Transport on the entrance gate did not change after March 1, 1996, while he worked at this terminal; that the parking area at the terminal was moved from one side of the building to another and three stalls were leased to another company; that there was just one drivers’ room and it was shared by both the NK leased drivers and the MK drivers; that there was one bulletin board in the drivers’ room and it is used for, among other things, dispatch orders and other paperwork for both the NK leased drivers and the MK drivers¹²; that Parker paid for uniforms for the drivers and for the maintenance of the uniforms but in May 1996 Mathes told the drivers that they would have to pay for the maintenance of the uniforms since McKinley was not going to continue the uniforms or pay for the maintenance; that he asked Mathes how McKinley could decide this when the drivers worked for Parker and Mathes did not answer; that thereafter the cost of maintaining the uniform was taken out of his paycheck; that new uniforms came in November or December 1996 and some of the drivers, including the NK leased drivers, wore the new uniforms; that before March 1, 1996, Mathes and Kolle gave the NK leased drivers their assignments and after March 1, 1996, Mathes and Kolle continued to give the drivers, including MK drivers, their assignments; that about once a month he saw MK Supervisors

¹⁰ The rider of NK and the Union to the agreement, which is effective for the period of November 15, 1994, to November 14, 1998, was received as GC Exh. 9.

¹¹ Hamilton explained that the individual must complete the 5-year increment in order to obtain the benefit from that 5-year increment.

¹² GC Exh. 12 was posted on this bulletin board.

Bill Halfman, Paul Showers and Rodger Nelson at the Dearborn terminal; that the NK leased drivers and the MK drivers turn in their paperwork to Mathes or Kolle that on two occasions in July and August 1996 he saw two individuals come into the facility apply for employment, and speak to Mathes; that both of these individuals were hired; that both before and after March 1, 1996, if he needed time off he would ask Mathes; that after March 1, 1996, the tractors were refueled out on the road and the fuel tank at the Dearborn terminal was removed; that before March 1, 1996, he never had to have a random drug test but as a leased driver to MK he had to submit to random drug testing which is a requirement of the United States Department of Transportation (DOT); and that after MK supplied uniforms not every employee wore them. Mathes testified that before March 1, 1996, he ran everything as far as NK was concerned, including soliciting new customers, submitting rates to new customers, and directing the entire maintenance operation; that MK had its own people who solicited customers, provided rates and cleared maintenance; that while NK did all of its billing, with MK all he does is verify that the paperwork turned in by the drivers is complete before it is sent to McKinley's office in Carson City, Michigan; that as of March 1, 1996, the involved drivers operated under MK's authority and NK's insurance had expired; that after March 1, 1996, MK acquired its fuel on the road whereas NK previously had a tank in the yard; that MK decals were placed on the tractors still in use¹³; that after June 1, 1996, he gave anyone seeking employment an application and referred them to Halfman in Carson City; that MK leased a portion of the same terminal that NK leased; that a couple of weeks before the hearing herein the NK sign on the fence outside the terminal was covered with a MK decal; that he does not have authority to discipline MK drivers; that only he or Parker can discipline NK drivers; and that he has neither been asked by management of MK to evaluate an MK employee's performance nor has he been asked to give input regarding a raise to an MK employee by management of MK; that he dispatched both NK and MK drivers; and that he or Kolle process the timesheets of the NK drivers and schedule their payroll and the timesheets of the MK drivers are sent to Carson City. Oresta Bersano, who was a truckdriver for NK, testified that there was no change in his job, wages, and benefits after March 1, 1996, while he worked for NK. Bersano testified that after he left NK to work for MK he received his assignments the same way after the switch; that after March 1, 1996, the supervisors or managers he saw on a daily basis at the Dearborn facility were Mathes and Kolle; that he saw Halfman at the facility maybe once a month, and McKinley probably once every 2 or 3 months; and that after he switched to MK if he could not resolve a problem through Mathes he would contact Halfman. On cross-examination Bersano testified that Mathes scheduled and dispatched the drivers, and would tell him what the route was if he had an assigned route; that he handed in his transportation related documents to Mathes and he told Mathes if there was anything that needed to be done to the truck; and that Mathes never disciplined him and if he wanted a raise he would not ask Mathes. McKinley testified that Mathes was middle management that he leased for MK to oversee the day-to-day operations of the busi-

ness at the terminal; and that he, McKinley, had no role in supervising or disciplining NK drivers.

By memo dated March 22, 1996, from Roger Nelson to the employees of M.K. Parker, A&C Carriers, and McKinley, General Counsel's Exhibit 12, Nelson indicated, among other things, that theft or dishonesty of any kind will be subject to discharge. Hamilton testified that Local 283 represents some of the employees of A&C Carrier.

On April 3, 1996, Bill Halfman of McKinley Trucking Co. according to the document, issued a letter of investigation to William Walker, who is a NK driver, regarding a spill at Monroe County Airport, General Counsel's Exhibit 13, Hamilton testified that letters of investigation sometimes result in discipline being issued. Bill Halfman testified that he is the safety director for A&C Carriers, McKinley Trucking and M.K. Parker Transport; that he receives his paycheck from A&C Carriers; that he hires the employees for all three companies and he is responsible for keeping the drivers in compliance with the DOT regulations; that McKinley Trucking owns A&C Carriers and M.K. Parker Transport; that Rodger Nelson signs the letters of investigation and he was gone at the time; that in the 2 years he has been safety director he has issued three or four letters of investigation when Nelson was gone; and that he issued a letter of investigation to an NK employee this was shortly after MK started on March 1 and he probably reacted on what he thought was best, not normally doing this job.

In early June 1996 McKinley talked to Horsch about the possibility of switching over to the MK board. Horsch testified that he and McKinley discussed money, the hourly wages and benefits; that McKinley indicated that he was going to hire new people because Norm Parker would not add drivers; that McKinley said that if Horsch would come over to MK he would be first in seniority; that McKinley said that the benefits would stay basically the same, the pay would be more per hour, he was going to start a 401(k) and he was going to contribute \$26 a week; that he asked McKinley to put his offer in writing but McKinley said that there was nothing at that time; and that he never got back to McKinley with an answer. McKinley testified that he initiated a conversation with Horsch and he told Horsch that if he switched to MK that it would probably cure the problem of working nights. On cross-examination McKinley testified that he told Horsch that at NK he was on the bottom of the seniority list which forced him to work nights and if he came to MK early enough he would be at the top of the seniority list which would allow him to work days.

Bersano testified that sometime before he left NK and went with MK he had a conversation with McKinley at the Dearborn terminal; that he asked McKinley about the benefits and pay that MK was offering; that McKinley responded that the benefits would be pretty much the same although MK would not pick up all the deductibles on the insurance, there would be a 55-cent-per-hour-pay increase; that McKinley said that he would be bringing in additional drivers to MK and he told Bersano and the other NK drivers present that it was the best time to switch because he was going to have to go out and hire more drivers off the street in order to fill the positions that he planned on; that he received a 55 cents per hour pay increase when he went to MK; that McKinley indicated that he wanted to get a 401(k) for the

¹³ Decals were placed on the trailer as weather permitted.

drivers; and that after he switched to MK in June 1996 his position on the schedule board changed in that while Jimmie Fortner was under him after the switch Fortner had been at NK a couple of more years than he had. On cross-examination Bersano testified that he initiated the discussion with McKinley; that the other drivers might have been present because there was a shift change; that McKinley answered the questions of the other drivers present; and that he switched to MK because it was his understanding from the meeting with the drivers just before the changeover that NK would not be around that much longer.

About the beginning of June 1996 Hamilton was told that there were rumors that McKinley may be wanting to hire workers for MK. Hamilton testified that he telephoned McKinley about the first week in June 1996 and asked him if he planned to do any hiring; that McKinley said that he did not have the drivers to cover the work and NK did not want to hire any more drivers; that he told McKinley that it sounded like some kind of a double-breasting operation and the Union had a contract with the company and the Union was supposed to supply the drivers; that McKinley said that the Union's problem would be with NK with which the Union had the contract; that he told McKinley that he, Hamilton, was going to speak to the steward about taking action; that with respect to what MK was going to pay the new drivers, McKinley said that nothing was determined; that when he asked McKinley whether they were going to end up with a contract with respect to the new drivers, McKinley said that it would not be out of the question but he would not have any interest with any style of Teamsters pension or the healthcare; that McKinley never sought to bargain with the Union about the terms and conditions of employment of non-leased drivers of MK; and that no Teamsters' pension contributions were made on behalf of new drivers hired by MK.

Mathes testified that the first MK driver was hired sometime in June 1996 when MK had more work available than NK could provide people to cover; and that the MK drivers had their own seniority and it did not affect the seniority of the NK drivers. On cross-examination Mathes testified that he probably answered applicant's questions about the job or the business; that he may have told the applicants the minimum requirements that they would have to meet in order for their application to be considered; and that he would send the application to Carson City; that he told the applicants that they would be contacted by Halfman; that sometimes Halfman interviewed applicants at the Dearborn terminal and he, Mathes, was asked to explain the dispatch or scheduling procedure but he never sat in for the entire interview; and that he believed he was asked how many additional drivers were necessary. McKinley testified that the first driver that MK hired was someone who worked for A&C who no longer wanted to work weekends or nights; that Mathes told him that Bersano was interested in switching to MK; that he spoke with Bersano who approached him when he was at the Dearborn facility; that when he told Mathes that the MK drivers come first Mathes reminded him that under the collective-bargaining agreement between NK and the Union the drivers had a minimum 48-hour guarantee; and that it was decided that the first five drivers out of the terminal would be leased drivers because he would have to pay for 48 hours for these drivers anyway. On cross-examination McKinley testified that he told Mathes that he wanted a peaceful

driving force and if he could work it out between the MK and NK drivers so that it was satisfactory to most people concerned, then he, McKinley, would not get involved in it; that he had Mathes put some of the NK drivers at the top of the list "because we did have guarantee to give to them—to honor their guarantee with the bargaining unit"; and that he and Mathes worked this out together.

At the end of June 1996 Steward Horsch contacted Hamilton and told him that MK had hired drivers and they were going to be scheduled on the board; and that he told Horsch that a grievance had to be filed. Horsch testified that when the MK drivers came on the board he was bumped to the night shift; and that some of the MK drivers went on the day shift. Horsch also testified that he talked with Mathes about working nights and nothing changed; and that he then spoke with McKinley who told him "you're stuck with the seniority of the N.K. unit." Mathes testified that when NK drivers Charles Messer and Robert Nelson left it created an opening on the night shift and he filled the opening by going to the next man on the list which was Horsch; and that when Horsch objected he told Horsch that his hands were tied.

General Counsel's Exhibit 15 is a list of dispatch orders dated June 24, 1996. It lists six night driver positions, including that of Horsch. This first list of dispatch orders which was posted after the MK drivers were hired was placed on the driver board. Mathes testified that the document was created by him; that it is strictly a scheduling tool; and that NK drivers make up the first five slots because pursuant to the collective-bargaining agreement between the Union and NK the drivers have a guaranteed minimum and MK agreed with NK to pay the minimum for these drivers. On cross-examination Mathes testified that the list does not indicate the order of seniority among all the drivers for shift choice; and that three company drivers went on days while there were leased drivers who remained on nights because it was decided between MK and NK that the NK drivers were overflow drivers for the Company now that the company had its own employees and MK drivers would be given preference with respect to where MK wished to have them placed.

By grievance report form dated June 26, 1996, General Counsel's Exhibit 11, Horsch alleges as follows:

Bargaining unit work has been unilaterally given to other divisions of McKinley, i.e., McKinley Transportation, A & C Carriers and MK Parker Transportation. This move deprives me of work conditions such as hours and shifts that my seniority otherwise would have provided me.

And the remedy asked for reads as follows:

To return all work previously performed by N.K. Parker . . . [Transportation] to N.K. Parker employees, any further changes . . . [in] work conditions should be bargained collectively with the Union.

A grievance meeting was held in late July 1996 at the NK/MK facility on the above-described grievance. Hamilton testified that also discussed at this meeting was an information request about who were the owners; that they¹⁴ discussed the issue that better

¹⁴ Present were Horsch and one of the drivers, Pat Emerick, himself, Norm Parker, Phil Mathes, Patty Parker, who is Norm's daughter, and an attorney.

shifts, starting times and days off were being taken away from the people with seniority; that Mathes said that they have a MK board and an NK board and he dispatches it appropriately, there is no seniority between the two groups, they are two separate groups and they are dispatched appropriately; that Mathes indicated that he worked for NK and he was leased to MK; that Parker said that only five, and not the entire group, were guaranteed to work for MK; that most of the drivers wanted the day shift and one of the reasons for the grievance was that Horsch had been moved from the day shift to the night shift but Mathes said that he needed to make room for the new drivers and he had dispatched appropriately; that under the involved collective-bargaining agreement seniority prevails with respect to dispatching and shifts; and that the new hires were not placed on the driver board in terms of seniority.

According to the testimony of Bersano, a couple of months after he switched to MK Mathes said that there was an opening on day shift and Mathes asked him if he wanted it. Bersano declined the offer at the time.

A letter of investigation dated November 19, 1996, to Horsch was received as General Counsel's Exhibit 17. It indicates

The incident you were involved in on *November 16, 1996* is under investigation. *Failure to notify dispatch of your intent to not complete your assigned shift.* You will be notified of the results upon completion of the investigation. [Emphasis in original.]

The letter was signed by Mathes for NK Parker. Horsch testified that he received a copy of this letter on or about November 19, 1996; that he was never questioned by anyone at NK or MK about the incident which was the subject of the letter of investigation; and that after November 16, 1996, he made deliveries for Marathon.

By letter dated December 4, 1996, Respondent's Exhibit 5, Hamilton advised McKinley as follows:

You are hereby advised that a majority of your employees, (drivers) have designated Teamsters Local Union No.283 as their collective-bargaining representative.

We demand recognition for the purpose of collective bargaining and I will be at your office on Tuesday, December 17, 1996, at 10:00 A.M., for the purpose of conducting our first bargaining meeting. If such date is inconvenient for you, please notify us so that a more convenient date can be agreed upon.

In the event of any discrimination against any of your employees because of their union activities or in the event of your refusal to bargain with us, we will take prompt action to remedy such discrimination or refusal to bargain.

McKinley testified that he also received a telephone message from Hamilton who indicated that he would be in Carson City for a bargaining session on December 17, 1996; that Hamilton did not show up for the meeting; and that he was aware that the Union filed a petition for an election and then withdrew the petition the same day the charge was filed herein. McKinley also testified that the Union represents employees of A&C at Romulus, Michigan.

By letter dated February 13, 1997, General Counsel's Exhibit 16, Horsch was advised by Mathes as follows:

Please be advised that your services for N.K. Parker Transport Company are no longer required. This notice is effective immediately.

On February 12, 1997, N.K. Parker Transport Company was advised that you had falsified a D.O.T. required form regarding your driving record. Further, we have been advised that as a result of the conclusion of an investigation into an incident where you abandoned equipment without anyone's knowledge or authorization, our customer suffered significant damage, due to your irresponsible action.

The customer, to whom your services have been leased by N.K. Parker Transport Company, will not permit us to use you on their equipment or to service their customers.

Mathes testified that Halfman advised him that in a DOT required 12-month review of his previous driving record Horsch had indicated that he had received one violation when in fact he had received a second violation plus he had his license suspended for a period sometime in October 1996; and that based on the rules and regulations of the collective-bargaining agreement NK decided to terminate. On cross-examination Mathes testified that he was probably advised by Halfman by telephone that Horsch's driving record did not meet MK's minimum standards on either October 12 or 13; and that he believed that MK's minimum driving record standards are two points. McKinley testified that in January or February 1997 he told Mathes that he was no longer to dispatch Horsch; that one of MK's major customers complained about late deliveries, loads that had been dropped and in one instance a station ran out of gas, and the driver was Horsch; that it was discovered that Horsch had falsified a DOT form regarding his driving record; and that he told Mathes and Parker that MK did not want Horsch driving for it anymore. On cross-examination McKinley testified that two of the stations which Horsch serviced ran out of gas with one instance occurring in November 1996 and the other in June 1996.

A grievance report dated "February 15, 1997," was received as General Counsel's Exhibit 18. It was filed by Horsch regarding his termination.

The Michigan Tank Carriers Joint State Committee minutes of regular meeting held on March 18, 1997, General Counsel's Exhibit 14, contain the following:

RESOLVED, that the driver, Steve Horsch be returned to work with the Employer at such time that the Employer has work available; and that the time the driver has been off since the grievance discharge be considered a suspension without pay and without benefits for falsification of Department of Transportation reports.

The completed minutes are dated March 24, 1997. Mathes testified that Horsch has not been put back to work because NK does not have a customer for which Horsch can work; and that NK's only customer, MK, has advised NK that Horsch's driving record does not meet their minimum standards. McKinley testified that he did not recall any conversation with Mathes or Parker following the hearing whether MK would make a tractor and trailer available to Horsch; that he thought Mathes and Parker understood his position that he did not want Horsch at MK; and that if Horsch applied for a job at MK he would not meet its standards with his driving record. Subsequently McKinley testi-

fied that MK will not hire anybody with more than two points on their driving record; and that, with respect to a driver who already works for the MK and then gets points on his driving record, he would consult with MK's insurance company to determine if the driver is a risk.

By letter dated March 25, 1997, on N.K. Parker Transport Co. letterhead, General Counsel's Exhibit 19, Horsch was advised by Mathes as follows:

Please be advised that you will remain in a number one call back position consistent with the judgment of the state committee.

You will be put on a regular schedule as soon as N.K. Parker Transport Company acquires another customer.

Bersano testified that at the end of March or the beginning of April 1997 Mathes approached him and told him that there was a position on the day shift because one of the drivers was going to be off sick for quite some time and possibly not coming back for medical reasons and he, Mathes, needed somebody to fill the position; and that he had talked to Mathes about getting on the day shift about 1 month prior to this conversation.

By memorandum dated April 7, 1997, General Counsel's Exhibit 7, Halfman advised NK Parker Dispatch as follows:

Our records show that Jake's [Landskroener] DOT physical expires on April 24, 1997. In order for Jake to remain a qualified employee, he must have his physical renewed, and a copy of his new physical card in my possession, no later than April 23, 1997.

Although not required by DOT that a driver take a drug test when renewing his physical, MK Parker Transport Company policy does require a drug test when renewing a driver's physical. Please see that Jake also receives a drug test when renewing his physical.

Halfman testified that he is responsible for making sure that any driver that is employed by MK, including those leased from NK, is a certifiable DOT employee. On cross-examination he testified that the MK and the NK drivers are in the same pool for drug testing; and that the drug test results for NK drivers are sent to him and not Mathes. Subsequently Halfman testified that the drivers of A&C Carriers and McKinley Trucking are also in the same testing pool.

Analysis

On brief the General Counsel contends that MK is a successor to NK in that MK is operating NK's previous tank truck transportation business at the same location as NK providing substantially the same services to substantially the same customers, the NK drivers are performing the same work with much the same equipment and they report to the same supervisors—who are also leased to MK—and but for the employee lease agreement all relevant factors exist to determine that MK is a successor; that the National Labor Relation Board (the Board) in *Harter Tomato Products Co.*, 321 NLRB 901 (1996), found that it was immaterial for establishing successorship status that the new employer ingenuity "leased" the predecessor's assets rather than purchasing them; that a new owner's failure to hire its predecessor's employees will not defeat a claim of successorship if such failure is shown to be motivated by the former employees' affiliation with

a union; that such unlawful motivation can be determined from union animus, a lack of a convincing rationale for refusing to hire the predecessor's employees and evidence supporting an inference that the new employer conducted itself in such a way regarding staffing as to avoid a bargaining obligation; that McKinley gave no explanation for his aversion to hiring NK's employees and MK presented no economic basis for its refusal to hire these employees at the time of the purchase; and that the employee leasing agreement was a means of MK attempting to evade recognition of the Union and assumption of the terms of the collective-bargaining agreement. Respondent MK, on brief, argues that it is not a successor to NK; that MK has not employed the NK drivers and has not assumed control over their day-to-day operations; that since NK still exists, it is hard to fathom how MK could have succeeded it; and that MK should not be found to be the successor to the NK business, which continues to exist as a labor leasing company. On brief NK argues that no employer-employee relationship exists between MK and the lease employees; that the only control which MK has is that which is necessary to preserve its motor carrier status; that even assuming, arguing that an employer-employee relationship existed between MK and the leased employees, MK would not qualify as a successor due to the lack of substantial continuity between the enterprises in that the business of MK is substantially different than that formerly done by NK since MK has additional customers, MK bills from its office in Carson City, MK has its own operating authority and liability insurance, fuel is now acquired on the road, uniforms are now optional and driver barbecues were initiated at the Dearborn terminal.¹⁵

As the Court pointed out in *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972):

It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.

As pointed out in *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 138–139 (3d Cir. 1976):

[T]he underlying policy of the successor employer doctrine . . . seeks to facilitate transfers of capital to enable reorganization and vitalization of business enterprises but at the same time protect employee rights and assure the accomplishment of the transition in an environment of industrial peace. [Citations omitted.] Changes in ownership of an enterprise may eliminate contractual obligations to employees, *NLRB v. Burns Security Services* . . . but a successor employer "has frequently been required to assume the statutorily-imposed duty of the predecessor to bargain with the designated representative of its employees." Note, *The Bar-*

¹⁵ Both Respondents cite *H&W Motor Express*, 271 NLRB 466 (1984), in their briefs in support of their arguments that NK and MK are not joint employers. MK asserts on brief that it is almost as though MK and NK patterned their conduct after the decision in *H&W* and their conduct should meet the same result as was reached in that case. NK argues that *H&W* presents a factual scenario nearly identical to the instant case.

gaining Obligations of Successor Employers, 88 Harv. L. Rev. 759, 760 (1975).

In determining whether an employer is a successor the following factors are considered: (1) whether there has been a substantial continuity of the same business operation; (2) whether the new employer used the same plant; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the employer employs the same supervisors; (6) whether the employer uses the same machinery, equipment, and methods of production; and (7) whether the employer manufactures the same product or offers the same services.

The court in *NLRB v. Security-Columbian Banknote, Co.*, supra at 139, went on to indicate:

These factors, it is often said, should be seen from the perspective of the employee. [Citations omitted.] This "employee viewpoint" derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from a sudden change in the employment relationship. [Citation omitted.] Thus, the inquiry must ascertain whether the changes in the nature of the employment relationship are sufficiently substantial to vitiate the employee's original choice of bargaining representative. [Citations omitted.]

As pointed out by counsel for the General Counsel MK is operating NK's previous tank truck transportation business at the same location as NK providing substantially the same services to substantially the same customers, the NK drivers are performing the same work with much the same equipment and they report to the same supervisors, and but for the employee lease agreement all relevant factors exist to determine that MK is a successor. Also as pointed out by counsel for the General Counsel, a new owner's failure to hire its predecessor's employees will not defeat a claim of successorship if such failure is shown to be motivated by the former employees' affiliation with a union and unlawful motivation can be determined from union animus, a lack of a convincing rationale for refusing to hire the predecessor's employees and evidence supporting an inference that the new employer conducted itself in such a way regarding staffing as to avoid a bargaining obligation. McKinley gave no explanation for his aversion to hiring NK's employees and MK presented no economic basis for its refusal to hire these employees at the time of the purchase. The employee leasing agreement was a means of MK attempting to evade recognition of the Union and assumption of the terms of the collective-bargaining agreement. McKinley wanted to have the employees of NK handle the involved traffic. It would not appear to be an easy task to get people to drive tankers transporting gasoline or aviation fuel, both of which are highly combustible. If McKinley was able to hire all of the drivers needed before the purchase, he would have needed between 30 and 60 days to train them. While McKinley testified that this would have been possible, it is noted that he did not deny Hamilton's testimony that he, McKinley, told the NK drivers during his first meeting with them that they were NK's most valuable asset and he would be getting a qualified trained workforce that knew the work and the equipment. Indeed McKinley made the utilization of "those drivers of Seller that Purchaser

deems necessary to operate its business" a condition precedent in the asset purchase agreement. The lease arrangement was not necessary to protect the pension rights of the NK drivers or avoid ERISA liability on the part of NK Parker. This could have been accomplished by MK hiring the involved drivers at the outset. But MK did not and McKinley did not give any valid explanation for his refusal. As became obvious, McKinley wanted NK's drivers to work for MK. He told them so and eventually he solicited them to become employees of MK. This was his intent all along. McKinley wanted the drivers. He did not want their collective-bargaining representative.

Respondents' reliance on *H&W Motor Express*, supra, is misplaced. That case, decided by then Chairman Dotson and Members Zimmerman and Hunter, involved a direction of election and a unit question which considered whether a purchaser and a labor broker were joint employers. There the independent labor broker, which had been in business for 3 years, provided labor to employers in 12 locations throughout the Midwest. At the time of the purchase the broker had been providing labor to the seller in the form of a terminal manager and five truckdrivers. The purchaser entered into an agreement with the broker to continue the staffing of the terminal with the employees of the broker. There the purchaser came upon a situation where there was a seller and a labor broker independent of the seller. Here the purchaser came upon a situation where there was only a seller. Only at that point in time was the leasing company created. And it was created at the behest of the purchaser by the seller. Why? Drivers like Bersano were not overly concerned with establishing pension rights. He could have been hired by MK immediately. And if he was hired as a part of the represented group of NK employees, there would not have been any reason to be concerned with any question regarding the pension. When it was created, the leasing company, unlike the broker in *H&W Motor Express*, served only the needs of the purchaser. McKinley had Norm Parker set up the employee leasing company as a means of evading recognition of the Union and the assumption of the terms of the involved collective-bargaining agreement. McKinley intended to hire all of the NK drivers. But he wanted to apply his own terms and conditions of employment and not have to bargain with the Union. McKinley demonstrated his antiunion animus. He did not supply a lawful explanation for his refusal to hire NK's drivers at the time of the purchase. There was none. The Act was violated as alleged. MK purchased the business (assets vis-a-vis stock) of NK and operated it in basically unchanged form. MK and NK entered into an employee leasing agreement in order for MK to avoid hiring a majority of NK's unit employees and to allow MK to evade recognition of the Charging Union and assumption of the terms of the collective-bargaining agreement and but for this MK would have employed, as a majority of its employees, individuals who were previous employees of NK. MK has continued the employing entity and is a successor to NK.

On brief, the General Counsel contends that NK and MK are joint employers of both the NK leased drivers and the MK drivers; that a joint employer relationship exists when two or more employers "codetermine those matters governing essential terms and conditions of employment," that the essential factor to be examined is whether one employer possesses sufficient control over the work of the employees of another employer; that there

must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction; that the evidence demonstrates that both NK and MK codetermined those matters governing terms and conditions of employment of all the drivers; that while the NK drivers were admittedly supervised by Mathes, who had the authority to fire and discipline them, MK also meaningfully affected the terms and conditions of employment of the NK drivers in that (1) Nelson, an A&C manager, issued a letter of investigation to an NK driver, (2) Halfman's authority over NK drivers exceeded merely assuring compliance with DOT when he imposed MK policy by requiring a drug test for an NK driver due for an annual physical, (3) MK also imposed its policy regarding pilferage on the NK drivers, and (4) it was a decision by MK that terminated the benefit of uniform maintenance for NK drivers; that MK and NK codetermine the dispatch order and seniority for the purposes of shift preference and days off of all the drivers, both MK and NK; that with respect to labor relations, NK meaningfully affected the terms and conditions of MK drivers in that Mathes (a) exercised judgment and discretion in the assignment of particular jobs to each driver which constitutes responsible direction, (b) also serves more than a reporting function in the discipline area because he exercises discretion in deciding when to report infractions of MK drivers such as tardiness or no call/no show to Carson City management, and (c) directs the MK drivers as well as the NK drivers since MK has no supervisors or managers at the facility on a daily or regular basis; and that a unit of drivers, both MK and NK, is an appropriate bargaining unit since all drivers, both MK and NK perform the same work at the same facility under the same working conditions and the same day to day supervision, they have ample opportunity to interact and have contact with one another, and they clearly enjoy a community of interest. MK, on brief, argues, as noted above, that this case is remarkably similar to *H&W Motor Express*, supra; that the examples of joint employer conduct offered by the General Counsel fall short in that (a) while transportation related documents filled out by NK drivers had MK's name on them, the documents were completed to either assure DOT compliance or monitor and charge for the freight being delivered, (b) Halfman's April 3, 1996 letter of investigation to Walker was the only such memo the General Counsel introduced to indicate that MK ever exercised control over an NK employee, and as testified by Halfman, it was more likely done as a result of confusion at the beginning of the new operation, and as a result of his subbing for a vacationing employee, (c) the Nelson memo regarding stealing fuel from a trailer is not sufficient to establish any joint employer relationship between MK and NK, (d) the April 7, 1997 Halfman memo regarding an NK's driver's DOT physical and drug test was merely a safety director's monitoring the status of all people driving under the MK authority, and (e) MK did nothing to terminate Horsch but rather simply advised NK that MK no longer desired Horsch's driving services; and that the employees were only disciplined or supervised by the proper parties and since there was no cross-over there is no joint employer. NK, on brief, argues that for a lessee of employees to be found a joint employer of those leased employees, it must be shown that the lessee possesses sufficient indicia of control over

those employees and meaningfully affects matters relating to their employment relationship.

As noted above, this case differs from *H&W Motor Express*, supra, in that, as concluded above, the leasing company here was established by the seller, NK, at the behest of the purchaser, MK, solely¹⁶ as a means to avoid the legal obligations. Is it necessary or even appropriate to grade the performance of this charade? The arrangement was a sham. It is not a question of how well they did or did not carry it off. A sham is a sham. The Respondents were doing what they believed would give them an argument for avoiding the involved legal obligations. Halfman's April 3, 1996 memo was a slipup. More accurately, Halfman in this instance unwittingly strayed from the script. As noted by the General Counsel, there were other slipups. NK and MK were codetermining those matters governing essential terms and conditions of employment. They have exercised common control and supervision of unit employees. Respondents are joint employers.

Paragraph 14 of the complaint alleges that in June 1996 MK through McKinley dealt directly with unit employees by encouraging them to leave the payroll of NK and become directly employed by MK, and by promising them benefits and improved working conditions. On brief, the General Counsel contends that Horsch did not solicit McKinley's offer to switch to MK and although Bersano initiated his conversation with McKinley, the other drivers present to whom McKinley addressed remarks encouraging them to switch to MK at that time did not solicit such an offer. MK on brief, argues that McKinley simply answered questions propounded to him by NK drivers, he made no promises of increased benefits indicating only that benefits would be pretty much the same; and that this is not the direct dealing or active solicitation of employees alleged. NK, on brief, argues that there was no encouragement to leave NK, any employee who went to MK approached McKinley, and Parker encouraged no one to leave.

Taking the last assertion first, the complaint refers to the conduct of McKinley not that of Parker. McKinley promised Horsch a pay increase, a 401(k) and a day-shift position. Only when he was asked to put it in writing did McKinley say there was nothing at that time. Also, as pointed out by General Counsel, the other drivers present with Bersano to whom McKinley addressed remarks encouraging them to switch to MK at that time did not solicit such an offer. Counsel for MK elicited the following testimony on cross-examination of Bersano:

Q. And any of the other drivers that were there that asked him [McKinley] questions, he answered their questions as well, correct?

A. Yes

This is not the same as argued on brief, viz, that McKinley simply answered questions propounded to him by NK drivers. McKinley did not deny Bersano's testimony that he, McKinley, told him and the other NK drivers present that it was the best time to switch because he, McKinley, was going to have to go

¹⁶ As the parties stipulated, as set forth above, MK was NK's only customer up to the time of the hearing herein. MK agreed to lease all of the drivers. At the outset McKinley concluded that as business grew he would have to add drivers. Before the hearing NK leasing neither intended to lease its drivers to anyone other than MK nor did it.

out and hire more drivers off the street in order to fill the positions he planned on. McKinley was encouraging the drivers to make the switch. The other drivers could have asked questions after the solicitation was made. MK's attorney did not establish when the other drivers asked the questions. MK violated the Act as alleged in this paragraph of the complaint.

Paragraphs 15, 17, and 18 of the complaint collectively allege that in June 1996 MK hired new unit employees as drivers and, without the Union's consent, unilaterally implemented different wages, benefits and working conditions—all of which are mandatory subjects for the purpose of collective bargaining—for new drivers different than those set forth in the involved collective-bargaining agreement. On brief, counsel for General Counsel contends that when a successor has made it perfectly clear that it intends to retain all of the predecessor's employees as a majority of its work force, the employer cannot make any changes in mandatory subjects without bargaining with the Union, *Spruce Up Corp.*, 209 NLRB 194 (1974); that where the Union was presented with a fait accompli as to the hiring and implementation of different terms, there is no requirement of a specific bargaining request from the Union to establish the violation; that as a successor MK was not free to hire drivers and unilaterally implement different terms and conditions of employment for them without bargaining with the Union; and that, as a joint employer while MK may not have been obligated to assume the collective-bargaining agreement, it was obligated to abide by the terms of the contract in hiring new drivers, *D & S Leasing*, 299 NLRB 658 (1990). As noted above, both MK and NK on brief, argue that MK is neither a successor nor joint employer. As concluded above that MK is both a successor and a joint employer. Consequently counsel for General Counsel is correct in her contentions as set forth above. For the reasons given by counsel for General Counsel MK violated the Act as alleged in paragraphs 15, 17, and 18 of the complaint.

Paragraph 16 of the complaint alleges that the following conduct is inherently destructive of the rights guaranteed employees in Section 7 of the Act: (1) MK and NK entering into an employee leasing agreement in order for Respondent MK to avoid hiring a majority of NK's unit employees and to allow MK to evade recognition of the Charging Union and assumption of the terms of the involved collective-bargaining agreement, (2) in June 1996 MK through McKinley dealing directly with unit employees by encouraging them to leave the payroll of NK and become directly employed by MK, and by promising them benefits and improved working conditions, and (3) in June 1996 MK hiring new unit employees as drivers and unilaterally implementing different wages, benefits and working conditions for new drivers different than those set forth in the involved collective-bargaining agreement. As concluded above, the leasing arrangement was a scheme entered into in an attempt to avoid that which is described in (1) above of this paragraph. In furtherance of its attempt to undermine the Union MK, as concluded above, dealt directly with the "leased" employees. And finally, as concluded above, MK engaged in the conduct described in (3), above in this paragraph.

As set out in *Esmark, Inc. v. NLRB*, 887 F.2d 739, 747-749 (7th Cir. 1989):

Some conduct is so inherently destructive of employee interests that it may be deemed proscribed [by section 8(a)(3)] without need for proof of an underlying improper motive. That is, some conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34-35, (1967) (citations omitted).

The Supreme Court has not provided a precise definition of "inherently destructive" conduct. However, it is clear that the label "inherently destructive" may be applied only to conduct which exhibits hostility to the process of collective bargaining itself Inherently destructive conduct is that conduct which has "far reaching effects which would hinder future bargaining"; i.e., that conduct which "creat[es] visible and continuing obstacles to the future exercise of employee rights."

[C]onduct may be inherently destructive even though it does not divide the work force into antagonistic factions, but instead "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of the employees."

[If the] conduct falls into . . . [this] category . . . no showing of antiunion motive . . . [is] required to support an 8(a)(3) finding. [T]he calculated repudiation of a collective bargaining and prompt institution of less favorable terms sends a signal to employees that despite their diligent efforts to organize and bargain collectively, their contract may be disregarded. Workers could wonder . . . why collective representation, with its attendant costs, is worthwhile if their employer can manipulate things so easily by selling assets As the Fifth Circuit explained in a remarkably similar case,

It would be a complete contradiction to state that [repudiation of a collective-bargaining agreement] did not jeopardize the Union's position as bargaining agent or diminish its ability effectively to represent [its members]. Furthermore, no conduct could more efficaciously convey to the employees the futility of engaging in concerted activity, and thereby directly and unambiguously deter the exercise of that right, the guarantee most fundamentally protected by the Act. From the [workers'] standpoint, it would be futile to engage in collective bargaining through a representative if the Company would repudiate any resulting agreement at will. Accordingly, the Company's conduct was inherently destructive of important employee rights, and no proof of antiunion motivation is required. [All bracketed material in original.] [Footnotes omitted.]

Where as here (1) MK and NK entered into an employee leasing agreement in order for MK to avoid hiring a majority of NK's unit employees and to allow MK to evade recognition of the Charging Union and assumption of the terms of the involved collective-bargaining agreement, (2) McKinley dealt directly with unit employees by encouraging them to leave the payroll of NK and become directly employed by MK, promising them

benefits and improved working conditions, and (3) MK hired new unit employees as drivers and unilaterally implemented different wages, benefits, and working conditions for new drivers different than those set forth in the involved collective-bargaining agreement, the conduct can only be described as inherently destructive.

Paragraph 20 of the complaint alleges that since on or about March 18, 1997, MK has refused to return Horsch to work. On brief the General Counsel contends that the reasons given by MK for no longer accepting Horsch were determined by the Michigan Tank Carriers Joint State Committee to be insufficient to justify termination; that despite this determination MK refused to return Horsch to work; that Horsch was the steward and as such was the "point man" for the Union in challenging MK's attempt to avoid recognition of the Union; that Horsch filed a grievance challenging the manner in which the MK drivers were hired and assigned work; that MK would perceive the elimination of Horsch as an additional means of facilitating avoidance of the Union and it would further MK's goal of eroding the bargaining unit in violation of Section 8(a)(3) of the Act; that MK's reason for maintaining its position against returning Horsch to work are disingenuous in that after the November 1996 incident Horsch continued to deliver for the customer, Marathon, and contrary to MK's position it was not shown that Horsch's driving record did not meet its standards; and that MK did have an obligation to bargain with the Union regarding mandatory subjects of bargaining, and, therefore, MK should have bargained with the Union regarding the reinstatement of Horsch and its failure to do so violated Section 8(a)(5) of the Act. MK, on brief, argues that the simple fact remains that Horsch does not meet the quality standards that MK imposes upon anybody "that is to drive"¹⁷ under its authority with equipment for which it is responsible; and that MK was not required by the decision of the Joint State Committee to return Horsch to work since that was left to Horsch's employer, NK. On brief, NK argues that MK was justified in refusing Horsch's services, "as evidenced by the grievance decision in its favor."¹⁸

Taking the last argument first, the grievance decision was not in favor of MK. And with respect to MK arguments, "that is to drive" does not accurately describe Horsch's situation in that he was already driving for MK. As McKinley testified, with a driver who already drives for MK and then gets points on his driving record the standard is not more than two points. Rather, McKinley testified that he would consult with MK's insurance company to determine if the driver is a risk. It was not shown that McKinley had done this with respect to Horsch. As pointed out by counsel for the General Counsel, MK's reasons for maintaining its position against returning Horsch to work are disingenuous. I agree with counsel for the General Counsel that the evidence of record establishes that in refusing to return Horsch to work after the committee decision, MK was motivated by its desire to rid itself of the steward, who it knew also filed a grievance which placed in question section 1.3 of the agreement—the

transfer of company title¹⁹ or interest, and erode the bargaining unit in furtherance of its goal to avoid dealing with the Union, and thereby violated Section 8(a)(1) and (3) of the Act.²⁰ MK also has an obligation to bargain with the Union with respect to mandatory subjects of bargaining. Horsch's reinstatement was such a subject. MK violated Section 8(a)(1) and (5) of the Act as alleged in paragraph 20 of the complaint.

MK takes the position that the charges against MK are untimely. More specifically, on brief, MK argues, in part, that the December 20, 1996 charge against MK alleges that it came to the Union's attention that MK had hired nonunion personnel. MK points out that any alleged unfair labor practice in this regard which occurred prior to June 20, 1996, would be barred. As noted above, at the outset of the hearing herein MK stipulated as follows; "18. Respondent MK first hired a driver on June 20, 1996." MK makes additional arguments on this point. In my opinion on page 22 of her brief counsel for General Counsel correctly points out why the arguments of MK on this point have no merit:

A charge is considered served on the day that it is deposited in the United States mail. Section 102.112 of the Board's Rules and Regulations; *Laborers Local 264 (D&G Construction)* 216 NLRB 40 (1975) enf'd. 526 F.2d 778 (8th Cir. 1976). Service on one employer in a joint employer relationship is considered service on the other. *Lucky Service Co.*, 292 NLRB 1159 (1989). The same is true for employers in a successorship situation. *Hartman Mechanical, Inc.*, 316 NLRB 395 (1995). An amended charge may allege unfair labor practices committed with[in] 6 months of the service of the original charge. The amended charges in the instant case were closely related to the original charges and arose from the same factual situation. *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Marriott Corporation*, 310 NLRB 1152 (1993); *City Wide Service Corp.*, 317 NLRB 861 (1995).

CONCLUSIONS OF LAW

1. NK is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. MK is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. The Charging Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.
4. The following described unit is an appropriate one for collective-bargaining purposes:

All full-time and regular part-time employees employed at Respondents' Dearborn, Michigan facility, but excluding all office clerical employees, guards and supervisors within the meaning of the Act.

¹⁹ As set out in GC Exh. 14, the grievance deals with sec. 1.3—Transfer of Company Title or Interest of the Central States Area Tank Truck Agreement, GC Exh. 8.

²⁰ While the inherently destructive finding above obviates the need to go into motivation, in my opinion what occurred here occurred because of union animus. But for Horsch's union activity, he would have been treated as any other person who was already driving for MK. He was not.

¹⁷ MK's Br. 25.

¹⁸ NK's Br. 14

5. At all material times the Charging Union has been the exclusive collective-bargaining representative of the unit described above for the purposes of collective bargaining.

6. Respondent M.K. Parker Transport, Inc. is a successor of N.K. Parker Transport, Inc. and as such, as here pertinent, as of March 1996 M.K. Parker Transport, Inc. has employed the employees in the above-described unit employed at the involved Dearborn, Michigan facility.

7. At all material times since March 1996, N.K. Parker Transport, Inc. and M.K. Parker Transport, Inc. have been joint employers of the employees in the unit described above.

8. By entering into an employee leasing agreement in order for M.K. Parker Transport, Inc. to avoid hiring a majority of N.K. Parker Transport, Inc.'s unit employees and to allow M.K. Parker Transport, Inc. to evade recognition of the Charging Union and assumption of the terms of the involved collective bargaining agreement M.K. Parker Transport, Inc. and N.K. Parker Transport, Inc. have violated Section 8(a)(1) and (3) and Section 8(a)(1) and (5) of the Act.

9. By dealing directly with Unit employees by encouraging them to leave the payroll of N.K. Parker Transport, Inc. and become directly employed by M.K. Parker Transport, Inc., and by promising them benefits and improved working conditions M.K. Transport, Inc. has violated Section 8(a)(1) and (3) and Section 8(a)(1) and (5) of the Act.

10. By hiring new unit employees as drivers and unilaterally implementing different wages, benefits, and working conditions for new drivers other than those set forth in the collective-bargaining agreement, M.K. Parker Transport, Inc. has violated Section 8(a)(1) and (3) and Section 8(a)(1) and (5) of the Act.

11. By engaging in the conduct described in the next preceding paragraph without the Charging Union's consent M.K. Parker Transport, Inc. has violated Section 8(a)(1) and (5) of the Act.

12. By refusing to return Steven Horsch to work since on or about March 18, 1997, M.K. Parker Transport, Inc. has violated Section 8(a)(1) and (5) of the Act.

13. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that M.K. Parker Transport, Inc. has made unilateral changes in certain terms and conditions of employment in violation of the Act, I recommend that M.K. Parker Transport, Inc. revoke, upon request by the Union, said unilateral changes only to the extent that the Union seeks to have them rescinded,²¹ and return to the status quo ante which was in effect prior to the implementation of such unilateral changes, by applying the terms of the collective-bargaining agreement which existed in March 1996 until Respondents bargain to impasse or agreement on terms and conditions of employment. Also, I shall recommend that Respondents be ordered to make whole the Charging Union and unit employees, for any losses suffered as a result of Respondents' unlawful conduct, computed on a quarterly basis from March 1, 1996, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). M.K. Parker Transport, Inc. having unlawfully refused to return Steven Horsch to work it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from March 18, 1997, to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

It will be recommended that MK be ordered to recognize and, on request, bargain collectively and in good faith with the Charging Union as the collective-bargaining representative of the unit employees.

[Recommended Order omitted from publication.]

²¹ It would be contrary to the purposes of the Act if unit employees were penalized by an order which would require the withdrawal of improved wages, benefits or working conditions for employees hired on or after June 1996. Consequently, such improvements shall not be rescinded unless specifically requested by the Charging Union.